Supreme Court of the United States

OCTOBER TERM, 1945

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY ..... *Appellants*

v. No. 328

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS ..... *Appellee*

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS ..... *Petitioner*

v. No. 329

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APPEAL FROM
SUPREME COURT OF ARKANSAS
AND
CERTIORARI FROM
SUPREME COURT OF ARKANSAS

BRIEF OF APPELLEE ON APPEAL AND PETITIONER ON WRIT OF CERTIORARI

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PARAGON PRINTING CO., LITTLE ROCK

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STATEMENT OF THE CASE

Appellant's statement of the case on page 1 of its brief is erroneous. Appellant says the Supreme Court of Arkansas "upheld the Arkansas severance tax statute, which laid a tax on the privilege of severing timber from

the national forests while title to the timber remained in the United States". It is the contention of the Commissioner of Revenues of Arkansas that the tax is laid on the severer, and the United States is not the severer. The United States required the Appellant to deposit $2500 by way of bond (appellant's br. 6), and a sum in cash not less than $1000 and not over $5000 (R. 9) as advanced payment, and to keep said amount paid in, until just before the "completion of the sale when the amount of the payment may be reduced in writing by the Forest Supervisor".

It has never been contended by the Arkansas Commissioner of Revenues, and no assessments for Severance Tax has been made against the United States or any of its instrumentalities, but when the United States contracts with individuals to remove timber from its lands, and the severer places it in commercial channels, the Commissioner does seek to tax it. Paragraph 2 of plaintiff's complaint (R. 3) plainly states that "plaintiffs are and were at the times hereinafter mentioned engaged in the business of severing timber from the soil and converting same into lumber, and doing wholesale and retail lumber business". The United States Government is not so engaged, is not a severer or producer of severed products, and therefore does not come under the provisions of the Arkansas Severance Tax Act, and indeed, could not come under its provisions. The severing contract provided that "No timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured, or counted by the Forest Officer" (R. 12).

There is no allegation in appellant's complaint that the United States severs the timber, and there is no con-

tention that the Arkansas Commissioner of Revenues is attempting to assess or collect a tax from, or otherwise hold the United States responsible in any way for the payment of the tax. It is simply an idea of defense on the part of the appellant to escape payment of the tax.

The allegations in appellant's complaint (R. 3-5), its Petition for Rehearing (R. p. 32-34), its "Statement and Designation under Paragraph 9, Rule 13" (R. 39-40), and its "Statement of Points to be Relied Upon and Designation as to Record Pursuant to Rule 13, Sub-division 9" (R. p. 41), recite entirely different statements of appellant's allegations and reasons. None of them are alike, and none of them are in keeping with the requirements of Section 237 (a) of the Judicial Code as amended, 28 U. S. C. Sec. 344.

There is nothing in this record to indicate that appellant is an instrumentality of the U. S. Government, or that the collection of the tax from appellant would in any way affect the United States Government in its Forest Reserve work, or in any other way. There is not a single allegation contained in appellant's Petition for Rehearing in the Supreme Court of Arkansas that compares with or means the same as either allegation in its Petition for Appeal to this Court (R. pp. 32-33 and 34-35).

It is impossible from the printed record in this case to determine definitely what questions were before the Supreme Court of Arkansas.

RECORD OF CROSS APPEAL OR WRIT OF CERTIORARI

The assignment of Errors in the Petition for Cross Appeal on behalf of Arkansas Revenue Commissioner, and treated by this Court as a Petition for Writ of Certiorari, as provided by 28 U. S. C. Sec. 344 (c), is the single allegation:

"The Supreme Court of Arkansas erred in ruling in its opinion of April 2, 1945, (L. R. p. Vol. 83, No. 1, page 938), that the appellants, Warren W. Wilson, et al., are not liable to the State for Severance Tax on timber severed by them from lands held by the United States as original owner, (U. S. C. A. Title 16, Par. 471)" (R. 38).

In Cross Appellant's Statement of Points to be Relied Upon Designation as to Record Pursuant to Rule 13, Sub-Division 9, in addition to his Assignment of Errors, the judgment of the Supreme Court of Arkansas is assailed as violative of U. S. C. A. Title 16, Par. 480, wherein is stated that all criminal and civil jurisdiction, with certain exemptions, shall remain in the State and that no citizen shall be relieved of his obligations to the State by enactment of the Statute (R. 41).

BRIEF AND ARGUMENT

Hereafter we shall endeavor to discuss the four questions presented by this court, in the order of their number, as set out on page 42 of the printed record.

The writer of this brief has been furnished with a proof sheet copy only of appellant's brief, and presuming that the finished brief will be as the proof copy, we proceed to a discussion of the four questions, as follows:

QUESTION NUMBER 1

> "1. Does the record affirmatively show that the validity of a state statute was drawn in question in the Supreme Court of Arkansas on the ground of its being repugnant to the Constitution or laws of the United States as required by section 237 (a) of the Judicial Code (28 U. S. C., Sec. 344)?"

Plaintiff's complaint under paragraph 5 thereof recites:

> "And the state's demand against the plaintiffs is in violation of the Acts of Congress above referred to".

And the first part of said paragraph 5 alleges that the plaintiffs were severing the timber under "authority granted by Acts of Congress, authorizing sale of timber in the National Forests" (R. p. 4).

The decision of the Chancery Court of Garland County (fol. 28) recites as follows:

"That the Arkansas severance tax, if it be applied to timber severed from the National Forest pursuant to agreements, such as those introduced in evidence in this cause between the United States and the persons severing said timber, would be a tax upon the operations of the Government of the United States and a tax on the right of the United States to harvest the mature timber on its National Forests; and the Arkansas severance tax does not apply to the timber severed by the plaintiffs from the National Forest" (R. p. 21).

There is no other question mentioned in the decree of the Garland Chancery Court in its decision of the questions involved.

The appellant, Wilson Lumber Company, in its petition for rehearing makes no mention of the Constitution of the United States nor of the violation of any federal law. It, therefore, is presumed that it was not contending that the statute of Arkansas violated any portion of the Federal Constitution or Federal laws. The petition for rehearing contains four paragraphs. Paragraph 1. That the court erred in holding that the tax was not a direct tax on the United States. Paragraph 2. That the court erred in holding that the tax did not interfere with the Government's business. Number 3. That the court erred in holding that the severance tax statutes do apply to the timber severed in the National Forest. Number 4 is a plea that the Commissioner of Revenues be permitted to amend his Certificate of Indebtedness filed in the Garland Circuit Clerk's office to claim tax for the timber severed from lands acquired by the United States under the provisions of Title 16, Section 516 U. S. C. A. (R. pp. 32-33).

Appellant's petition for appeal to this court dated July 6, 1945, makes no mention whatsoever that the Arkansas statute is in violation of the constitution and laws of the United States as required by said Section 237 (a) of the Judicial Code (28 U. S. C., Section 344) (R. pp. 34-35).

It will thus be seen that the question never having been decided by the Chancery Court of Garland County, Arkansas, and never having been reviewed by the Supreme Court of Arkansas could not and is not affirmatively shown by this record to be properly before this court for adjudication.

QUESTION NUMBER II

> "2. Does the record affirmatively show that the argument was made in the Supreme Court of Arkansas that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

There is no mention in the complaint that the severer is required to collect the tax from the United States. No mention of such requirement is found in the Chancery Court decree of Garland County. No mention of such requirement is found in the motion for rehearing before the Supreme Court of Arkansas, the petition for appeal to this court, and is first mentioned in paragraph C in appellant's "statement and designation under paragraph 9, rule 13", filed August 27, 1945 (R. p. 40).

In fact, appellant, in its brief on page 13, admits that it has made no direct reference in this record of any

affirmative contention before the Supreme Court of Arkansas, that the Arkansas law requires the severer to collect the tax from the United States.

On pages 31 and 32 of appellant's brief will be found that portion of Arkansas' severance tax law appearing as Section 13382 of Pope's Digest of the Statutes of Arkansas as follows:

> "*Who liable for tax.* Except as otherwise in this section provided, the making of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products, whether as owner, lessee, concessionaire or contractor.
>
> The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total part due by the respective owners of such natural resources at the time of severance".

We fail to find a reference to this section of law in the record before this court. Hence, we refer to it from appellant's brief at pages 31 and 32.

We fail to find any other reference to said question Number 2 in the record and therefore contend that the question is not affirmatively shown by this record as having been properly submitted to the Supreme Court of Arkansas.

According to said Section 13382 of Pope's Digest, the severer is not required to make the collection of the

tax from the United States, for the United States is not a severer of natural products under the meaning of said section but when the appellant, Wilson and Company, severs said products for market purposes it becomes liable as a severer or producer as defined by the above section and becomes liable for the payment of the tax. Wherein does the liability of Wilson and Company interfere in any way with the rights of the Federal Government under its contract with the appellant? There is no provision under the above section that the United States Government will be held responsible for the payment of said tax and so long as no demand is being made by the State of Arkansas that the United States Government is liable for tax on said severed products, we think such contention on the part of appellant, Wilson and Company, is far fetched and amounts to a moot question. We think the United States is the only rightful party to make such contention. A private contractor, such as Wilson and Company, certainly is not an instrumentality or agency of the Federal Government and we pursue that argument no further. A reading of appellant's brief, pages 13 and 14, will disclose that the appellant really admits that Question No. 2 does not affirmatively appear by the record to have been before the Supreme Court of Arkansas for determination.

QUESTION NUMBER III

"3. Assuming that question (2), *supra*, is answered in the negative, does this court have jurisdiction to consider the argument that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States? Compare *Dewey* v. *Des Moines*, 173 U. S. 193, 198."

It is the contention of the appellee that there is no requirement in the Arkansas law that the severer shall collect the tax from the United States. There is no allegation in the complaint in the Garland Chancery Court, in the petition for a rehearing before the Supreme Court; the question was never presented to nor decided by the Garland Chancery Court and, therefore, is not shown in this record to have ever been decided by any court. Therefore, it is the contention of the appellee, supported by this record, that the question is not before this court and that it is without jurisdiction to determine said question.

QUESTION NUMBER IV

> "4. Do the assignments of error in this Court raise the question whether the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

We here quote the language of this court as to the requirement for compliance with Section 237 (a) of the Judicial Code as to the necessity of affirmatively showing in the record on appeal to this court the questions before the State Supreme Court. Many case are to be found and the late case of *Flournoy* v. *Wiener*, 321 U. S. 253, is a very recent case and the rule is clearly expressed as follows:

> "Section 237 (a) of the Judicial Code authorizes an appeal to this court from the judgment of the highest court of the State 'where is drawn in question' the validity of a statute of the United States and the decision is against its validity. The error is therefore ore cognizable on appeal. The question for our decision is whether, the State Court having rested its decision and judgment upon two

independent grounds, each adequate to support the decision, but only one of which appellant has assigned as error on appeal to this court, we have jurisdiction to decide either.

* * * *

"It is a familiar rule, consistently followed, that upon appeal from a State Court this court will not pass upon or consider federal questions not assigned as error, or designated in the points to be relied upon, even though properly presented to and passed upon by the State Court" (p. 259).

We, therefore, assume that in keeping with the requirements of said Section 237 (a) and the numerous decisions of this court upholding its requirement and this record being silent as to the presentation of the question to the Chancery Court or to the Supreme Court of Arkansas, said question is not before this court for determination.

The Judgment of the Arkansas Supreme Court

There is no question but that the Arkansas Supreme Court had jurisdiction to render judgment in the cause, for it tries *de novo*, all cases on appeal from the Chancery Courts of Arkansas. In addition to the stipulation of facts filed in the Garland Chancery Court (R. pp. 6-7) the depositions of two witnesses, the affidavit of a witness, together with the Severance Contract entered into by the severer, Wilson & Company, with the United States, were all before the Chancellor, and on appeal were all before the Arkansas Supreme Court, in the transcript, where the Supreme Court tried the case, *de novo*, rendering its judgment, which is found in the printed record herein, beginning on page 22 and ending on page 31. After recit-

ing the Statement of the Case, the contentions of the parties, the substance of the Severing Contract, the filing of the Certificate of Indebtedness for the tax (R. pp. 22, 23) as a judgment in the Garland Circuit Court, it proceeds to a determination, as follows:

"I. Was the Arkansas Severance Tax Law Intended to Apply to Persons Severing Timber from Lands of the United States in a National Forest. We answer the question in the affirmative". Then the Court proceeds to a particular explanation of the Arkansas Severance Tax Law, consisting of its several Legislative Acts, and the decisions of the Arkansas Supreme Court in its earlier decisions, with citations from Standard Law Publications, and ends its first declaration with "and the tax would apply to the case at bar, as the transaction here involved does not come within either exemption".

Then it discusses the contention of the appellant that it is an Instrumentality of the Government, as follows:

"II. Does the Immunity of a Federal Government Instrumentality Inure to the Benefit of the Appellees?" Its first statement is: "It is fundamental that the Federal Government and its instrumentalities are exempt from State taxation. * * * On the other hand, the tax immunity does not inure to a person, firm, or corporation merely because such claimant has a contract with, or a grant from, the Federal Government. The Court cites numerous state and U. S. Supreme Court decisions in support of both statements, finally predicating its decision upon the cases of *James* v. *Dravo Construction Co.*, 302 U. S. 134; *Mason & Co.*, 302 U. S. 186, both of which are clear and decisive that mere contractors with the Federal Government do not constitute Government Instrumentalities (R. pp. 24-26).

Then, on pages 28 and 29 of the printed record, the Court discusses whether or not the Severance Contract with the Government constituted a "Burden on Government Operations", and states: "We hold that the appellees, in cutting and removing the timber, acted as independent purchasers, and not as a Government Instrumentality, and that it is not a tax on Government Operations". Then is recited the decision of the case of *Buckstaff* v. *McKinley*, 198 Ark. 91, as affirmed by this Court in 308 U. S. 358, wherein this Court said:

> "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter". Then, "So we hold that the appellees are not entitled to claim any tax immunity as a Government Instrumentality, or because of Governmental operation, and are liable for severance tax on all timber cut from land that became a part of the national forest by Governmental Acquisition under U. S. C. A. Title 16, Section 516".

As to Lands in Which the Federal Government Never Ceded Its Rights to Any State, i. e. Indian Lands

The court then discussed the cases of *C. O. & G. Ry. Co.* v. *Harrison*, 235 U. S. 259; *Oklahoma* v. *Barnsdall*, 296 U. S. 521, and held that because the State had no "residuum of authority", that the State could not collect a Severance Tax. The Assignment of Errors (R. 38), and the Statement of Points (R. 41) of the cross appellant herein questions that ruling, for the reason that according to the Federal Law, i. e. U. S. C. A. Title 16, Par. 480, the the states do have "residuum of legislative authority". That, therefore, the Arkansas Supreme Court erred in so holding.

We do not deem it necessary to go further into the decision of our courts to the effect that Wilson and Company are not instrumentalities of the Federal Government and that they may be made subject to a tax by the State of Arkansas without interference with the United States Government in its forest program and it being so well established that the Federal Government is not subject to taxation by a state we do not offer any additional decisions.

In accordance with the provisions of the Arkansas Severance Tax Law (Section 1, Acts of Arkansas, No. 158 of the Acts of 1937) on moneys collected from severance taxes is used for the purpose of development of the forests of Arkansas, the same work in which the Federal Government is engaged. Since the Federal Government is in no way affected by the operation of the Arkansas Severance Tax Law, the Arkansas law cannot be said to violate the Federal Forestry Act. The Arkansas law, therefore, can in no way conflict with either provision of the Constitution of the United States as referred to in plaintiff's complaint.

Finally, we conclude with the suggestion if the State of Arkansas has a "residuum of legislative authority", as held by the decision of the Supreme Court of Arkansas herein in the lands "acquired by the United States under the Act of Congress of March 1, 1911 (U. S. C. A., Title 16, Section 516)" then we see no good reason why the state would not also have a "residuum of legislative authority" in the lands which it had never ceded to the states but under which lands the states are granted all civil and criminal rights as to jurisdiction of its courts (U. S. C. A., Title 16, paragraph 480) and when timbers therefrom are severed by private individuals for commer-

cial purposes, as was done by Wilson and Company in the instant case, the collection of the tax by the State of Arkansas could not be said to interfere with the Government's control, nor be a burden upon the United States Government, but is simply a tax upon the products severed from the soil by private concerns for commercial purposes.

If such contention of the Commissioner of Revenues of Arkansas is not the co rect contention, we cannot understand how the Commissioner would be legally justified in collecting sales tax or gross receipts tax on merchandise and materials for the United States Government in the war program and income tax from the income of such contractors. The collection of such taxes cannot and do not interfere with the United States Government and such is not a tax upon the United States Government as declared by this court in many cases in recent months. The appellee, therefore, submits that the Judgment of the Supreme Court of Arkansas wherein it sustains the Arkansas Commissioner of Revenues in collecting severance tax from the appellant on lands which had been ceded to the United States Government under the Acts of Congress of March 1, 1911 (U. S. C. A., Title 16, Section 516), should be sustained, and that its denial of the right to collect such tax from the severance of timber from the lands under which this state is granted all necessary criminal and civil jurisdiction under the provisions of U. S. C. A., Title 16, paragraph 480.

Respectfully submitted,

R. S. Wilson

O. T. Ward

Solicitors for Appellee on Appeal and Petitioner on Writ of Certiorari

APPENDIX

28 U. S. C. A.

Paragraph 344. (*Judicial Code, section* 237, *amended.*) *Appellate jurisdiction of decrees of State courts, certiorari.* (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition of certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: Provided, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court

to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title. (R. S. Paragraphs 690, 709; Mar. 3, 1911, c. 231, paragraphs 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, paragraph 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, paragraph 1, 43 Stat. 937).

U. S. C. A. Title 16, *Paragraphs* 471, 516

Paragraph 471. National forests; establishment; limitation on additions in certain States; lands suitable for production of timber.

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

(a) No national forest shall be created, nor shall any additions be made to one created prior to June 25, 1910, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

(b) The President, in his discretion, is authorized to establish as national forests or parts thereof, any lands within the boundaries of Government reservations, other than national parks, reservations for phosphate and other mineral deposits, or water-power purposes, national monuments and Indian reservations, which in the opinion of

the Secretary of the department now administering the area and the Secretary of Agriculture are suitable for the production of timber, to be administered by the Secretary of Agriculture under such rules and regulations and in accordance with such general plans as may be jointly approved by the Secretary of Agriculture and the Secretary formerly administering the area, for the use and occupation of such lands and for the sale of products therefrom. Any person who shall violate any rule or regulation promulgated under this subdivision shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or imprisoned for not more than one year, or both. (March 3, 1891, c. 561, paragraph 24, 26 Stat. 1103; March 4, 1907, c. 290, 34 Stat. 1271; June 25, 1910, c. 421, paragraph 2, 36 Stat. 847; Aug. 24, 1912, c. 369, 37 Stat. 497; June 7, 1924, c. 348, paragraph 9, 43 Stat. 655).

Paragraph 480. The jurisdiction, both civil and criminal, over persons in national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

Paragraph 516. *Purchase of lands approved by commission; consent of State; exchange of lands; cutting and removing timber*

The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have

been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission. No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. With the approval of the National Forest Reservation Commission as provided by this section and sections 515 of this title, and when the public interests will be benefitted thereby, the Secretary of Agriculture is authorized, in his discretion, to accept on behalf of the United States title to any lands within the exterior boundaries of national forests acquired under said sections which, in his opinion, are chiefly valuable for the purposes as therein stated, and in exchange therefor to convey by deed not to exceed an equal value of such national forest land in the same State, or he may authorize the grantor to cut and remove an equal value of timber within such national forests in the same State, the values in each case to be determined by him. Before any such exchange is effected notice of the contemplated exchange reciting the lands involved shall be published once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any county in which may be situated any lands or timber to be given in such exchange. Timber given in such exchanges shall be cut and removed under the laws and regulations relating to such national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands so

accepted by the Secretary of Agriculture shall, upon acceptance, become parts of the national forests within whose exterior boundaries they are located, and be subject to all the provisions of sections 480, 500, 513-519 and 521 of this title. (March 1, 1911, c. 186, paragraph 7, 36 Stat. 962; March 3, 1925, c. 473, 43 Stat. 1215).

Acts of Arkansas, No. 158, *Year* 1937, *P.* 581, *Sec.* 1

Section 1. After the passage of this Act all severance tax collected on timber under existing provisions of law shall, upon payment into the State Treasury, be credited to the "State Forestry Fund" to be used by the State Forestry Commission for the development of the forests of the State.